Supreme Court, U.S.
FILED
SEP 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-5555 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LARRY GENE HEATH,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Alabama

REPLY BRIEF FOR PETITIONER

RONALD J. ALLEN
Counsel of Record

Northwestern University
School of Law
357 E. Chicago Avenue
Chicago, Illinois 60611
(312) 908-8372

FRANK OF PAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. The State Of Alabama's Argument Concerning The Scope Of The Dual Sovereignty Exception Is Based Upon A Fundamental Misreading Of The Precedents Of This And Other Courts	1
II. The State Of Alabama Has Mischaracterized Mr. Heath's Argument Concerning The Nature Of The Appropriate Inquiry Into The Scope Of The Dual Sovereignty Exception	8
III. The State Of Alabama's Assertion That It Has Jurisdiction Over The Homicide Committed In Georgia Is Insupportable	12
CONCLUSION	18

TABLE OF AUTHORITIES

	Page
Alfred L. Snapp & Son, Inc. v. *Puerto Rico*, 458 U.S. 592 (1982)	3
Bank of United States v. *Daniel*, 37 U.S. (12 Pet.) 32 (1838)	3
Cicci v. *Illinois*, 356 U.S. 571 (1958)	10
Coleman v. *Tennessee*, 97 U.S. 509 (1878)	7
Commonwealth v. *Mills*, 447 Pa. 163, 286 A.2d 638 (1971)	6, 9
Ex Parte Dobard, 435 So.2d 1351 (Ala. 1983)	15
Garcia v. *San Antonio Metro. Transit Authority*, 105 S.Ct. 1005 (1985)	1
Goldsmith v. *Cheney*, 447 F.2d 624 (10th Cir. 1971)	5
Hernandez v. *State*, 397 So.2d 715 (Fla. Dist. Ct. App. 1981)	5, 9
Lane County v. *Oregon*, 74 U.S. (7 Wall.) 71 (1869)	3
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)	3
National League of Cities v. *Usery*, 426 U.S. 833 (1976)	1
People v. *Cooper*, 398 Mich. 450, 247 N.W.2d 866 (1976)	6, 9
People v. *Gay*, 407 Mich. 681, 289 N.W.2d 651 (1980)	6
People v. *Holt*, 91 Ill.2d 480, 440 N.E.2d 102 (1982)	6, 15
People v. *Walker*, 123 Cal. App. 3d 981, 177 Cal. Rptr. 147 (1981)	4
Southern Ry. Co. v. *Railroad Commission of Indiana*, 236 U.S. 439 (1915)	16
Speiser v. *Randall*, 357 U.S. 513 (1958)	6
State v. *Brown*, 441 N.E.2d 1126 (Ohio Ct. App. 1981)	5
State v. *Glover*, 500 S.W.2d 271 (Mo. Ct. App. 1973)	5
State v. *James*, 203 Md. 113, 100 A.2d 12 (1953)	4
State v. *Straw*, 626 S.W.2d 286 (Tenn. Crim. App. 1981)	4, 5
United States v. *Barnhart*, 22 Fed. 285 (Circuit Court, D. Oregon 1884)	7
United States v. *Grimes*, 641 F.2d 96 (3rd Cir. 1981)	6
United States v. *Lanza*, 260 U.S. 377 (1922)	2, 16
Wiley v. *Altman*, 52 N.Y.2d 410, 438 N.Y.S.2d 490, 420 N.E. 2d 371 (1981)	4, 9

CONSTITUTIONAL PROVISIONS:

United States Constitution, Fifth Amendment ..... *passim*
United States Constitution, Fourteenth Amendment. 12, 18

Table of Authorities Continued

Page

STATUTES:

Ala. Code § 13A-5-40(a)(1) 13, 14
Ala. Code § 13A-5-40(a)(13) 16
Ala. Code § 15-2-3 18
Sup. Ct. R. 21.1 17

MISCELLANEOUS AUTHORITIES:

Blakesley, A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crime, 1984 Utah L. Rev. 685 11
Comment, Jurisdiction Over Interstate Felony Murder, 50 U. Chi. L. Rev. 1431 (1983) 13

ARGUMENT

I

The State Of Alabama's Argument Concerning The Scope Of The Dual Sovereignty Exception Is Based Upon A Fundamental Misreading Of The Precedents Of This And Other Courts

The central theme, and crucial error, of Respondent's argument is that the precedents of this Court establish that "the application of the dual sovereignty doctrine depended solely on whether the two governments actually derived their power to prosecute from separate sources and were thus separate sovereigns." Respondent's Brief at p. 13. The Respondent's argument attributes to this Court a decision making process that places sole reliance on *a priori* definitions and that is not influenced by any other factor. Such a rigid and formalized approach finds no support in the cases of this Court. Rather, this Court has always examined the relevant institutional relationships that underlie claims of right grounded in assertions of sovereignty in the effort to resolve the competing claims of the litigants that appear before it. Indeed, just last term this Court made explicit its approach to questions of sovereignty when it rejected the attempt to rely on *a priori* definitions of sovereignty in *Garcia* v. *San Antonio Metro. Transit Authority*, 105 S.Ct 1005 (1985) and looked instead to the underlying institutional relationships. Id. at 1016-1017. Nor was *Garcia* an aberration. The case that *Garcia* overruled, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), employed the same analytical approach of looking beyond labels to the underlying interests. See Powell, J., dissenting in *Garcia*, 1055 S.Ct. at 1023-1024.

This is also the approach taken by the Court in its double jeopardy cases. As is discussed fully in Petitioner's Brief at pp. 22-35, this Court has examined the relevant institutional interests in determining the scope of the dual

sovereignty exception to the double jeopardy prohibition. The precedents of this Court are not to be searched in order to find a simplistic syllogism that controls decision, as Respondent asserts. Rather, those cases provide the framework with which complex questions of rights and obligations are resolved by an analysis that is sensitive to the various interests at stake. That this Court considers the implications of the various interests at stake in its resolution of the issues presented in litigation rather than simply relying on a rigid formalism based on *a priori* definitions is so clearly correct that it need not be discussed further.

Indeed, it bears pointing out that were this not so, the instant case would be very easy to decide. The simplistic rule that most easily can be extracted from this Court's previous dual sovereignty decisions is not that which Respondent asserts. It is instead that double jeopardy does not apply to two successive prosecutions for the same offense brought by fundamentally different governmental entities *that possess concurrent territorial jurisdiction*. The Respondent's own brief demonstrates this. Respondent asserts that *United States* v. *Lanza*, 260 U.S. 377 (1922) is "perhaps the leading case in this area of the law . . .," Respondent's Brief at p. 15, and that "The Court meant what it said in *Lanza* . . ." Id at 16. What the Court said in *Lanza* is: "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter *within the same territory* . . ." *Lanza*, supra, at 382 (emphasis added). Were this Court to employ the state of Alabama's approach to decision making, the Court obviously would be compelled to reverse Mr. Heath's conviction. *Lanza* provides no authority in Respondent's rigid formalistic sense for the application of the dual sovereignty exception to a situation

of extra-territorial assertions of jurisdiction, as is present in the instant case. Moreover, *every dual sovereignty case decided by this Court involves concurrent territorial jurisdiction*. The state of Alabama would have this Court apply a rigid formalistic approach that picks and chooses among those aspects of the prior dual sovereignty cases that favor the state's claim while concomitantly ignoring those factors that are favorable to Mr. Heath. Obviously the state of Alabama cannot both press upon the Court a formalistic approach to decision making, and at the same time ignore the formal elements of this Court's precedents.

Respondent has not only fundamentally misread the dual sovereignty cases; Respondent also has misread those cases in this Court from different contexts that it relies on to establish the meaning of "sovereignty" and again for the same reason. On p. 22 of its Brief, Respondent cites to four of this Court's cases in an effort to bolster the argument concerning the nature of Alabama's sovereignty. As even a cursory reading of each of these cases makes clear, each one was engaged in an explication of the implications of a state's sovereignty within its borders. See, *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71 at 76 (1869), *Bank of the United States* v. *Daniel*, 37 U.S. (12 Pet.) 32, 54-55 (1838); *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592 at 601 (1982), *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 at 428-30, 436 (1819). In this case, the state of Alabama is asserting the right to try Mr. Heath for an act that occurred in Georgia. Accordingly, its reliance on cases such as these to advance its notion of sovereignty is obviously misplaced.

As suggested above, notwithstanding the inherent shortcomings of the approach urged upon this Court by Alabama, the Petitioner would be quite content to have

this Court adopt the state's suggested formalistic approach to decisionmaking precisely because this Court has only approved the dual sovereignty exception in cases of concurrent territorial jurisdiction, which is not present in the instant case. In fact, after diligent search counsel for Petitioner has been unable to find any federal court at any level that has approved the extra-territorial application of the dual sovereigny exception to the double jeopardy prohibition, and the Respondent has cited no such case, either. At p. 25 of its Brief, the state of Alabama does cite seven state cases and one Tenth Circuit decision that it asserts supports the proposition that the dual sovereignty exception applies to successive state prosecutions, but once again Alabama has fundamentally misread the precedents upon which it relies. The only case that does support that proposition is *State* v. *Straw*, 626 S.W.2d 286 (Tenn. Crim. App. 1981), which is in reality a sham prosecution case and is discussed in full in Petitioner's Brief at p. 20. The remaining cases, discussed in the order they appear in Respondent's Brief, are:

1. *Wiley* v. *Altman*, 52 N.Y.2d 410, 438 N.Y.S.2d 490, 420 N.E.2d 371 (1981). The issue in *Wiley* was whether a prosecution for conspiracy to murder in Maryland precluded a murder prosecution in New York. The court held that it did.

2. *State* v. *James* 203 Md. 113, 100 A.2d 12 (1963). In *James*, the defendent had been convicted of nonsupport of his children in Delaware, where he was a resident at the time of the conviction. He subsequently moved to Maryland and three years later was prosecuted in Maryland for nonsupport, but only for the time he was a resident in Maryland.

3. *People* v. *Walker*, 123 Cal. App. 3d 981, 177 Cal. Rptr. 147 (1981). Defendant was convicted for possession

of stolen property in Nevada and for robbery in California, which are separate offenses.

4. *Hernandez* v. *State*, 397 So.2d 715 (Fla. Dist. Ct. App. 1981). *Hernandez* involved the traditional dual sovereignty exception as applied to a subsequent state prosecution following an earlier federal prosecution. It says nothing about successive state prosecutions.

5. *State* v. *Brown*, 441 N.E.2d 1126 (Ohio Ct. App. 1981). Defendant was prosecuted for kidnapping in Kentucky and rape in Ohio, which are separate offenses.

6. *State* v. *Glover*, 500 S.W.2d 271 (Mo. Ct. App. 1973). Defendant was prosecuted for burglary and theft in Missouri and for possession of stolen property in Kansas, which are separate offenses.

7. *Goldsmith* v. *Cheney*, 447 F.2d 624 (10th Cir. 1971). Defendant was prosecuted for conspiracy in Nevada and as an accessory in Wyoming. Because these are separate offenses, the court felt there was no need to discuss the dual sovereignty issue. Id at 628 n. 3.

The combined efforts of the parties in the present case have yielded only a single case where a defendant is unmistakably tried by two different states for the same offense, and that is *State* v. *Straw*, supra, which is a sham prosecution case. Accordingly, there is virtually no support for the proposition that the dual sovereignty exception should be extended to allow successive state prosecutions for the same offense. That proposition, in turn, puts the Respondent's position in stark relief. The state of Alabama is asking this Court to countenance a remarkable arrogation of power. As petitioner's Brief discusses at pp. 22-40, there is little justification for that arrogation of power in the policies of either the double jeopardy prohibition or the dual sovereignty exception.

Moreover, the paucity of case law at any level supporting the application of the dual sovereignty exception to allow successive state prosecutions for the same offense is in large measure a function of the fact that such cases simply are not brought with any frequency. The absence of such prosecutions speaks volumes about the "traditions and conscience of our people", which is one important component of constitutional adjudication. *Speiser* v. *Randall*, 357 U.S. 513, 523 (1958). There are few such prosecutions because this nation abhors multiple prosecutions and punishments for the same offense. Indeed, even in the federal/state context where dual sovereignty is most defensible, the principle is virtually unanimously lamented. See *United States* v. *Grimes*, 641 F.2d 96,104 (3rd Cir. 1981); *Commonwealth* v. *Mills*, 447 Pa. 163, 286 A.2d 638 (1971); *People* v. *Cooper*, 398 Mich. 450, 247 N.W.2d 866 (1976).

The state of Alabama has cited virtually no support for the extension of the dual sovereignty exception to a case of extra-territorial jurisdiction, and the state has obviously misread the cases upon which it does rely. Based upon that misreading, Alabama is asking this Court to approve what might be the first case where a defendant is tried twice for the exact same offense by two different states where there is not some other factor involved, such as one of the prosecutions being a sham. Alabama is unmistakably asking this Court to be the first court of last resort to countenance the first multiple prosecutions for the same murder, and in addition this case is apparently the first case in our nation's history where one state has attempted to prosecute for a murder committed within another state.[1] See, *People* v. *Holt*, 91 Ill.2d 480, 440 N.E.2d 102,

---

[1] Since the Petitioner's Brief on the merits was written, counsel for Petitioner has found two other cases in addition to *People* v. *Gay*, 407

107 (1982) (No reviewing court has ever affirmed jurisdiction of felony murder on the basis of jurisdiction over the underlying felony). If that is to be done, it should not be done in reliance on the rigid formalistic approach pressed by the Respondent. Rather it should only be done by a careful analysis of the underlying interests involved. Those interests are fully discussed in Petitioner's Brief at pp. 22-40, where it is demonstrated that there is inadequate justification to extend the dual sovereignty exception to include successive state prosecutions for the same offense. That discussion will not be reiterated here. However, we will in the next section correct certain misunderstandings and mischaracterizations in the Respondent' Brief of the interest analysis discussed in the Petitioner's Brief.

Mich. 681, 289 N.W.2d 651 (1980), discussed in Petitioner's Brief at p. 22, n. 8, where multiple prosecutions for the same murder were brought. In *Coleman* v. *Tennessee*, 97 U.S. 509 (1878), the Court reversed a Tennessee conviction for murder because the defendant had previously been courtmartialled for that same offense committed while the defendant was serving in the Union Army in Tennessee while Tennessee was a belligerent. In *United States* v. *Barnhart*, 22 Fed. 285 (Circuit Court, D. Oregon, 1884), the defendants had been indicted for manslaughter under federal law for the killing of an Indian for which they had previously been acquitted in a state court. The defendants pleaded autrefois acquit to the federal indictment. The court held the state acquittal was not a bar to the federal indictment. The court based its decision in part on the dual sovereignty exception and in part on the grounds that the state acquittal might have been a sham: "No white man was ever hung for killing an Indian, and no Indian tried for killing a white man ever escaped the gallows." Id. at 289.

II

The State Of Alabama Has Mischaracterized Mr. Heath's Argument Concerning The Nature Of The Appropriate Inquiry Into The Scope Of The Dual Sovereignty Exception

As is discussed fully in Petitioner's Brief at pp. 22-26, the Court has applied the dual sovereignty exception where four conditions have been met: 1. concurrent territorial jurisdiction, 2. by governmental entities pursuing quite diverse interests, 3. where there is a risk of interference by one governmental entity in the affairs of another, 4. and where multiple prosecutions are necessary for the satisfaction of the legitimate purposes of each governmental unit. Alabama's Brief collapses this complex set of institutional concerns into a single dimensional "interest analysis" and purports to demonstrate how problematic its reconstruction of Mr. Heath's argument is. Respondent's Brief at pp. 25-30. We agree that the interest analysis as discussed in the state's Brief is somewhat problematic. However, what is discussed there bears little resemblance to Petitioner's argument.

Apart from being an oversimplified version of Mr. Heath's position, which is adequately demonstrated by comparing Respondent's Brief at pp. 25-30 to Petitioner's Brief at pp. 22-26, the primary error of the Respondent is its assertion that the effect of adopting Mr. Heath's argument would be to generate a horrible quagmire of difficult questions that would be presented in an endless stream of cases. The state of Alabama has obviously misread the Petitioner's Brief. As is discussed there in full at pp. 22-31, this Court has applied the dual sovereignty exception only where each of the four conditions cited above has been met. One of those is an analysis of the relevant institutional relationships in order to determine whether the possibility of undesirable intergovernmental conflict is so

great that two prosecutions for the same offense must be allowed, notwithstanding the deleterious impact of that conclusion on an individual's right to be placed in jeopardy a single time for a single offense. Thus, it has been this Court that has looked at these questions in order to determine the scope of the dual sovereignty exception to the double jeopardy prohibition. Petitioner is merely advancing the proposition that this Court should, once again, follow that same approach. Consequently, the lower courts will not be bedeviled by difficult questions if this Court resolves the double jeopardy question in Mr. Heath's favor. The State's argument, in short, is really quite beside the point.[2]

It also bears reiterating that the instant case is relatively easy to resolve in terms of the relevant institutional concerns. This is discussed in Petitioner's Brief at pp. 36-37, and will not be repeated here. The state's responses

---

[2] In Part III of Petitioner's Brief an argument is made that, if the Court extends the dual sovereignty exception to successive state prosecutions, defendants should at least be allowed to demonstrate that the second prosecution served no separate state interest. Should the Court adopt this position, it is the defendant, not the prosecuting authorities who will be "bedeviled" by the questions raised by Respondent. Moreover, Respondent's assertions that an interest analysis in individual cases would be difficult to administer is belied by the facts. States typically do not allow successive prosecutions for the same offense regardless whether the first prosecuting authority is the federal government or another state. The second prosecution is typically allowed only when it serves a distinct social interest from the first prosecution. Contrary to the implication of Respondent's parade of horribles, Respondent's Brief at 25-30, the cases indicate no difficulty in making that determination. See, e.g., *Commonwealth* v. *Mills*, 447 Pa. 163, 286 A.2d 638 (1971); *People* v. *Cooper*, 398 Mich. 450, 247 N.W.2d 866 (1976); *Wiley* v. *Altman*, 52 N.Y.2d 410, 438 N.Y.S.2d 490, 420 N.E.2d 37 (1981); *Hernandez* v. *State*, 397 So.2d 715 (Fla. Dist. Ct. App. 1981).

to this position are quite enlightening, and upon being sorted out demonstrate what little justification there is to allow successive state prosecutions for the same offenses:

1. On pp. 31-32, the State asserts an interest "in seeing that persons who violate its laws receive the degree of punishment provided under Alabama law," id. at 31. Alabama, in short, is dissatisfied with the life sentence Mr. Heath received in Georgia, and wishes to punish him more severely. A mere desire to increase the punishment a person receives is hardly an adequate reason to justify an exception to the double jeopardy prohibition, however. To the contrary, one of the purposes of the double jeopardy prohibition is precisely to insulate a defendant from repeated attempts to increase his sentence, especially—as is true in Mr. Heath's case—where the effort is designed to obtain the death sentence. *Ciucci* v. *Illinois*, 356 U.S. 571, 573 (1958). In addition, Alabama is in the curious posture of being dissatisfied with a sentence imposed in Georgia for a criminal act that occurred in Georgia. Thus, Alabama is essentially arguing for the right to police through internal prosecution the sentences given by other states for acts occurring in those states. Petitioner respectfully suggests that Alabama's "interest" in such a matter is hardly a compelling one.

2. The state of Alabama also asserts an interest in protecting its own citizens and makes the remarkable suggestion that the state of Georgia is not as concerned about the lives of Alabama's residents while they are in the state of Georgia as is the state of Alabama. Respondent's Brief at 31. However, Alabama cites no support for this ascription of callousness to the state of Georgia. Moreover, it is difficult to comprehend how the prompt investigation and conviction of Mr. Heath for murder in Georgia lends support to this allegation. In addition to

there being no support whatsoever for Alabama's allegation, there is also no support for the assertion of jurisdiction on this basis. Alabama is implicitly asserting the right to try an offense commited extra-territorially upon one of its citizens. It cites no authority allowing it to do so, and the reason is that no such authority exists. See Blakesley, *A Conceptual Framework For Extradition And Jurisdiction Over Extraterritorial Crime*, 1984 Utah L. Rev. 685, 715-16.

3. The state of Alabama also asserts that there will be deleterious consequences to the administration of justice if this Court does not expand the dual sovereignty exception to include successive state prosecutions. In particular, Alabama asserts that if multiple prosecutions are not allowed "Prosecutors may find it necessary to rush their cases to trial rather than risk being precluded under a [sic] uncertain test," Respondent's Brief at 29, and "Prosecutors may be anxious to make [certain] deals, even to lesser included offense, rather than take a chance on being beaten to the courthouse by another state." Id. at 29-30. These are hardly serious concerns. The only effect of this Court not expanding the dual sovereignty exception to include successive state prosecutions for the same offense would be to preclude two prosecutions for the same offense where concurrent jurisdiction exists. Those cases are quite rare; as the Alabama Prosecutor told the jury at Mr. Heath's trial: "This is a rather unique case." Trial Record at 304. He certainly is correct; as discussed above there are virtually no cases of successive prosecutions for the same offense. Thus, it is difficult to understand who will be doing all the "rushing" about in order not "to be beaten to the courthouse" that Alabama is concerned about. Moreover, Alabama's discussion suggests that prosecutors are in some kind of competition

with each other. Petitioner knows of no support for such a view, and Respondent provides none. We would suggest that a much more plausible description of the normal inter-office relationship of prosecutors is that prosecutors co-operate with one another. The only effect of a decision in favor of Mr. Heath would be to encourage that healthy co-operation that surely occurs today as a matter of course (as the joint investigation by Alabama and Georgia in the instant case confirms). Moreover, if some unusual case comes along where a prosecutor in one state agrees to allow a defendant to plead to a very low charge in order to insulate him from charges in another state, the doctrine of sham prosecution is sufficient to handle the problem. What the state of Alabama has done, though, is to use the possibility of such an unlikely event as the justification for a large reduction in the scope of the double jeopardy prohibition, and consequently its argument is not compelling.

III

The State Of Alabama's Assertion That It Has Jurisdiction Over The Homicide Committed In Georgia Is Insupportable

In Part III of its Brief, Respondent asserts that Petitioner's Brief "attempts to show that Alabama did not have jurisdiction over [Mr. Heath's] crime." Id. at 33. Respondent is correct that Petitioner is of the view that Respondent lacks jurisdiction over the homicide that occurred in Georgia, and further that it was an egregious default of professional responsibility on the part of Petitioner's counsel before the courts of Alabama not to raise the absence of jurisdiction as a violation of fourteenth amendment due process, thus precluding raising that issue on direct appeal to this Court. Nonetheless, Petitioner's Brief does not attempt to argue that Alabama

lacks jurisdiction. Petitioner's Brief explicitly assumes Alabama had jurisdiction and argues that the dual sovereignty exception should not be applied where the defendant has already been tried in the state where the crime occurred and where the second prosecuting state is attempting to exercise extra-territorial jurisdiction. Petitioner's Brief at p. 15. In short, Respondent has seriously mischaracterized Petitioner's argument. In addition to mischaracterizing Petitioner's position, Alabama also makes an affirmative argument that it possesses jurisdiction of this homicide that calls for at least a brief response. Respondent's Brief at 33-34.

Alabama justifies its jurisdiction in this case on a state statute that grants jurisdiction when an offense is "commenced" within the state. Id. at 34. Ala. Code § 15-2-3 (Reproduced in Respondent's Brief Appendix A). Such statutes have been enacted in recent years to deal with a serious problem. Acts may be put in motion in one state leading to a criminal offense, and the forbidden result may occur in another, thus raising questions as to where the perpetrator may be tried. In order to facilitate prosecution in such cases, statutes such as Alabama's have been enacted, and some courts have reached a similar conclusion through the common law process. See generally Comment, *Jurisdiction Over Interstate Felony Murder*, 50 U. Chi. L. Rev. 1431 (1983).

The state of Alabama would apparently have this Court believe that its assertion of jurisdiction over the homicide that occurred in Georgia is an uncontroversial application of such a statute. That is not so, however. The "crime" for which Alabama is purporting to prosecute Mr. Heath is in reality two separate offenses—murder and kidnapping. By a definitional exercise based upon Alabama Criminal Code § 13A-5-40 (a)(1) (reproduced in Appendix A of Peti-

tioner's Brief) Alabama has combined these two offenses into a single offense. Under Alabama law, the only capital crimes are murders committed under certain forms of aggravation. A number of those types of aggravation are that a murder is committed in connection with some other felony, including murder during a kidnapping which is involved in Mr. Heath's case. In such a case, § 13A-5-40 allows the death penalty to be imposed if the separate offenses of murder and kidnapping are established. That §13A-5-40 relates these two offenses for punishment purposes and does not create a new offense is evident from the title of Chapter 5 of the Alabama Criminal Code, which contains §13A-5-40. The title is "Punishments and Sentences." The state of Alabama is attempting to employ this sentencing scheme to bootstrap itself into jurisdiction of the murder that occurred in Georgia. Its precise method of doing so is to assert that this sentencing scheme creates new "crimes" and that Mr. Heath's single crime created by this ostensible sentencing provision began in Alabama with a kidnapping.

Alabama's jurisdictional theory raises grave problems. There are only two ways to conceptualize what it has done, and both are very problematic. The first is that Alabama may be asserting the right to redefine criminality in such a way that would lead to a drastic change in the administration of criminal justice. Alabama may be asserting the right to define crimes that link together as a new offense what heretofore had been separate offenses and punish all of them through this new linkage on the grounds that one of them occurred in Alabama. This would allow Alabama to take jurisdiction over any offense committed anywhere so long as some other related offense was committed in Alabama. Needless to say, this would amount to a drastic reordering of criminal jurisdic-

tion in this country. In addition it would expose offenders to the risk of multiple trials and punishments for the same offense, because Alabama also claims the right to try someone for one of its new "offenses" even though the defendant has previously been tried in another state for the traditional offense incorporated into Alabama's new conception of criminality.

The second way to conceptualize Alabama's assertion of jurisdiction in this case is even more troublesome. The reality of the Alabama statutes relevant to this litigation is that murder is the offense and kidnapping is an aggravating factor relevant to sentencing. See, e.g., *Ex Parte Dobard*, 435 So. 2d 1351, 1359 (Ala. 1983). Thus, the alternative theory that may underly its assertion of jurisdiction in this case is that whenever a matter relevant to sentencing occurs within Alabama, Alabama has jurisdiction over the subsequent crime no matter where it is committed and regardless whether the relevant offense had already been tried in the state where it was committed. Indeed, that is apparently what it means for a crime to "commence" in Alabama in the state's view. This theory would work an obvious and drastic change in the administration of criminal justice in this country. See, e.g., *People* v. *Holt*, 91 Ill.2d 480, 440 N.E.2d 102 at 104 (1982).

Either of these theories would explain Alabama's assertion of jurisdiction in Mr. Heath's case. One way to view this case is that Alabama has combined the separate offenses of murder and kidnapping into one crime. The other is to view it as a case where a factor relevant to sentencing—the kidnapping—occurred within the state and the relevant crime—the murder—occurred elsewhere.

Regardless of which theory properly explains Alabama's assertion of jurisdiction in this case, the result is highly problematic and leads to remarkable conclusions. Just how remarkable is sufficiently demonstrated by the instant case where Alabama purports to have the authority to try Mr. Heath for a murder that occurred in Georgia and where Mr. Heath had already been convicted of that offense in that state. One more example of the scope of Alabama's theory of jurisdiction may be useful, however. Another subsection of the Alabama Criminal Code makes it a "capital offense" for a person previously convicted of murder within twenty years to commit another murder. Alabama Criminal Code § 13A-5-40(a)-(13) (Reproduced in Appendix A to Petitioner's Brief). The previous murder is analogous to the kidnapping in Mr. Heath's case and would form the basis of Alabama's assertion of jurisdiction. What that means is that if someone is convicted of murder in Alabama and subsequently commits another murder within 20 years anywhere at all (presumably "even on the moon," Joint Appendix at 58, Trial Record at 610-11), then that person commits a capital offense in Alabama. Petitioner respectfully suggests that such a drastic reordering of the administration of criminal justice ought not to be countenanced.

Respondent is in error, then, in its assertion that Petitioner in its brief contested Respondent's jurisdiction over the murder. Respondent is correct, however, that Petitioner is of the view that Alabama does not have jurisdiction over the homicide that occurred in Georgia. Moreover, it also bears pointing out that counsel for the Petitioner should have discussed the jurisdiction issue in his Brief. In *Lanza*, supra, at p. 384, this Court cited with approval the following passage from *Southern Ry. Co.* v. *Railroad Commission of Indiana*, 236 U.S. 439, 445 (1915):

> In support of [dual sovereignty] numerous cases are cited which hold that the same act may constitute a criminal offense against two sovereignties, and that punishment by one does not prevent punishment by the other. That doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction (citation omitted).

As this passage makes clear, the dual sovereignty exception is premised upon both sovereigns having jurisdiction of the relevant crimes, and without jurisdiction the dual sovereignty exception does not apply. Accordingly jurisdiction is a necessary component of the application of the dual sovereignty exception. This Court granted certiorari on the issue of the applicability of the dual sovereignty exception to successive state prosecutions. A grant of certiorari extends to all issues reasonably included within the question presented. Sup. Ct. R. 21.1 Jurisdiction, being a necessary ingredient of the application of the dual sovereignty exception, is obviously subsumed within the grant of certiorari on the larger question of the scope of the dual sovereignty exception. Accordingly, the question of Alabama's jurisdiction over the murder in Georgia is properly before the Court, and the Court should not countenance Alabama's extraordinary arrogation of power to try events unmistakably within the jurisdiction of its sister states.

CONCLUSION

Petitioner respectfully requests that the Court hold that his rights under the double jeopardy clause and the due process clause of the fourteenth amendment were violated by his being prosecuted by the state of Alabama for the same capital murder for which he was previously prosecuted by the state of Georgia and accordingly that the Court reverse Petitioner's Alabama Conviction for murder and remand Mr. Heath to the Georgia authorities to continue serving his sentence of life imprisonment. Alternatively, this Court should remand this case to the Alabama courts to allow Mr. Heath to demonstrate that his prosecution in Alabama served no different interests from his prosecution in Georgia and thus that his double jeopardy rights were violated by his prosecution in Alabama.

Respectfully submitted,

RONALD J. ALLEN
Counsel for Petitioner

Professor of Law
Northwestern University
School of Law
357 E. Chicago Avenue
Chicago, Illinois 60611
(312) 908-8372